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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 In Re: METHYL TERTIARY BUTYL 00 MDL 1358 (SAS)  
4 ETHER ("MTBE") PRODUCTS 00 CV 1898 (SAS)  
5 LIABILITY LITIGATION

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6 New York, N.Y.  
7 March 19, 2014  
8 3:30 p.m.

9 Before:

10 HON. SHIRA A. SCHEINDLIN

District Judge

11 APPEARANCES

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(Case called; all parties present)

THE COURT: We have received a number of letters, A huge numbers of attachments things aren't going so well again. But the years go by; some years are better years and some years, worse years. This one is bad.

The March 3 letter, which is the plaintiffs' preconference letter had five attachments, some longer than others.

The defendants' preconference letter of March 11 had I think 13 attachments, and that really is a lot and kind of defeats the purpose of a page limitation. We have to talk about that again.

The plaintiffs' reply letter is March 14. It had two attachments.

The defendant's reply letter of March 14 has eight. So, all around, the defendants are up to 20 different attachments. We should have a little chat about how to do that.

The plaintiffs have three agenda items, and the defendants have six agenda items. Of the plaintiffs' three agenda items, the first one is moot. That had to do with the Tauber pending motion to dismiss. The plaintiffs' opposition was due and came in. I saw it in today's mail. So there is nothing to discuss with respect to agenda item one, agreed?

MR. AXLINE: Agreed, your Honor.

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1 THE COURT: So that takes us to plaintiffs' agenda  
2 item two, which is what plaintiffs describe as defendants'  
3 excessive and duplicative expert designations in the Puerto  
4 Rico case. I need to understand how many of the alleged 75  
5 expert witnesses are in play here? Is it really 75, if you  
6 include 26(a)(2)(B) and 26(a)(2)(C)? There were two different  
7 groups totaling 75?

8 MR. MILLER: Yes, your Honor.

9 THE COURT: Mr. Miller, yes. Because the defendants  
10 come back and talk about having only 35, and I think that's  
11 maybe Ms. Gerson is the one who is on the line for saying 35.  
12 Were you limiting it yourself to (a)(2)(B) when you said there  
13 were only 35.

14 MS. GERSON: We were talking plaintiffs grouped  
15 together retained experts and 26(a)(2)(C) experts, although  
16 their letter only appeared to be complaining about (a)(2)(C)  
17 witnesses.

18 THE COURT: What is the number of each.

19 MS. GERSON: It actually breaks down exactly 35 of  
20 each.

21 THE COURT: Oh, exactly 35 of each.

22 MS. GERSON: So focusing on the (a)(2)(C) witnesses, I  
23 think we point out in our letter --

24 THE COURT: Let me understand what the plaintiffs'  
25 complaint is. I want to make sure I understood the numbers.

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1 It is 35 of one kind and 35 of another kind. That happens to  
2 be 70, not -- is that what the complaint was, that there was  
3 75? Already we seem to have gone down by five, which is good  
4 news. Did we reduce it by five? Because the complaint was 75.  
5 Now you are telling me there are 70, which sounds ridiculous  
6 anyway. But are there 75 or 70.

7 MR. MILLER: I think your Honor is right that it is  
8 70.

9 THE COURT: So you are complaining about 70, not 75.  
10 Small progress, but I assume you think 70 is still way out of  
11 line. Whether it is the retained kind or the inside kind, it  
12 is still a problem.

13 MR. MILLER: It is, your Honor.

14 THE COURT: And you are complaining about both groups.

15 MR. MILLER: Yes. But we met and conferred, and I  
16 think that we can make substantial progress in dealing with the  
17 35 current and former employees testifying as experts through a  
18 meet-and-confer process. I told counsel what I thought my  
19 solution was because part of what we are concerned with is  
20 duplication. Part of what we are concerned with is taking 35  
21 additional depositions.

22 THE COURT: Right. No, it's horrible.

23 MR. MILLER: And I think that we can probably at a  
24 minimum cut the number of depositions of the 35 down  
25 substantially.

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1 THE COURT: The (a)(2)(C) ones.

2 MR. MILLER: That's correct.

3 THE COURT: But the retained ones, (a)(2)(B) ones, I  
4 don't know whether we are calling them retained or just  
5 (a)(2)(B), whichever is clear for the record. One second.  
6 Give me a minute to have the rule in front of me, because  
7 either way there has to be a submission. And you also are  
8 complaining about the inadequacy of the submissions, and we  
9 will get to that in a minute, too. It will be convenient to  
10 have the rule open.

11 MR. MILLER: My suggestion, your Honor --

12 THE COURT: Wait, no; no suggestions until I get the  
13 rule open is what I said.

14 Okay, so the (a)(2)(C)'s are the ones you think you  
15 can negotiate about?

16 MR. MILLER: Yes.

17 THE COURT: You realize, of course, that they still  
18 have to disclose the subject matter in which the witness is  
19 expected to present evidence under rules of evidence 702(3) and  
20 (5), and the summary of facts and opinions to which that  
21 witness will testify. So they are not just fact witnesses, as  
22 I understand it, who happen to be on the payroll. They are  
23 being offered also as experts who do not have to provide a  
24 report.

25 MR. MILLER: That's correct.

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1 THE COURT: Then they have to do these other things.  
2 Have they done these other two things? Have they designated  
3 the subject matter and summary and facts upon which they plan  
4 to testify?

5 MR. MILLER: They have written a paragraph and they  
6 say things like the witness will cover industry practices,  
7 without specifying them, which is a pretty broad category, in  
8 my mind.

9 THE COURT: I can help you out. I don't find that  
10 satisfactory. The whole point of 26(a)(2)(C) was to relax the  
11 written report requirement but to still require that if they  
12 are going to give opinions, expert opinions under 702(3) or  
13 (5), they have to do (ii), which is a summary of the facts and  
14 opinions to which the witness is expected to testify. That  
15 broad sentence won't do it. It would save time, it would help  
16 me and everybody else figure out duplication. It might avoid  
17 depositions if that were done right. So I think you should  
18 make a separate two- or three-page submission for each of them  
19 that complies with Rule 26(a)(2)(C).

20 MS. GERSON: Your Honor --

21 MR. MILLER: We do not have two or three pages --

22 THE COURT: I know you don't.

23 MR. MILLER: -- on anyone.

24 THE COURT: I know you don't, and I think you should.  
25 So whether you ask for it or not, Mr. Miller, I want it. I

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1 want a proper two- or three-page single-spaced summary for each  
2 of these people, if they are going to give expert opinions. If  
3 they are just going to talk about the facts of their job or  
4 something, then they are like any other fact witness and  
5 nothing is required. They are just going to be an everyday  
6 percipient witness, like everybody else. But if they are going  
7 to give opinions, that's why the rule is written as it is  
8 written. You have a certain amount of time to produce a  
9 statement from each them. And one of the excuses for having so  
10 many people is that there are 14 defendants. So I am not  
11 looking at you, Ms. Gerson, I don't think you have to write 35  
12 of these, but there are 14 defendants. Each defendant is going  
13 to have to talk to their, whatever it is, two or three --

14 MS. GERSON: Your Honor --

15 THE COURT: -- people in house -- I don't know how  
16 else to call them -- employees, and get them to write up the  
17 opinions on which they plan to give expert testimony and the  
18 facts of which they expect to testify, etc., the facts and  
19 opinions, a real statement that might take care of depositions  
20 if they knew what they were going to say and would also help  
21 them make arguments about being duplicative.

22 MS. GERSON: Your Honor, I think we understand that.  
23 I do think we have invited plaintiffs to point out --

24 THE COURT: They don't need to do it. I'm not  
25 satisfied with the description I heard in the one paragraph you

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1 gave. That's not explicit enough. So if you want to test out  
2 what is explicit enough and do one that's more detailed, send  
3 it to Mr. Miller and the court, and see if there is an  
4 objection, before you do 34 more of the same, that's fine. So  
5 maybe you want to do one in the next three days, send it over  
6 and say, Will this be satisfactory to you, Mr. Miller and to  
7 you, the judge.

8 Mr. Riccardulli, you have been here long enough, if  
9 you want to confer, the right way to do it is you say, your  
10 Honor, may I have a moment? Otherwise I consider it rude.  
11 Once you say, May I have a moment, I say, Sure, and I stop  
12 talking.

13 MR. RICCARDULLI: I apologize, your Honor.

14 THE COURT: Any time you want to confer with anybody,  
15 you say, May I have a moment please, and then go ahead and  
16 confer. Given that, you do or don't?

17 MR. RICCARDULLI: I do, for five seconds.

18 MS. GERSON: Your Honor, we have a few examples I  
19 think that defendants have done, some defendants have done more  
20 than others.

21 THE COURT: This probably isn't the time. If you have  
22 one that you think really is fuller and complies with  
23 (a)(2)(C), send that one over to Mr. Miller, copy to the court,  
24 I think, and say, Will this satisfy everybody? If it will,  
25 then all the rest have to be brought up to that level. And

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1 then if Mr. Miller wants to make an argument that it is  
2 duplicative, overlapping, and there are still too many in that  
3 group, I will at least have paper to be able to figure that  
4 out. So let's not spend any more time on (a)(2)(C), because he  
5 doesn't think it is worth it and I don't either. Can you give  
6 the next examples over in the next day, since you think you  
7 have one.

8 MS. GERSON: Yes, your Honor.

9 THE COURT: When you get that, Mr. Miller, if that  
10 example is satisfactory to you, then the other 34 should be  
11 due, all of them, no later than two weeks from today.

12 MR. MILLER: Yes, your Honor.

13 THE COURT: Two weeks from today would be April 2, all  
14 35. But if that one isn't satisfactory and you can't resolve  
15 it, since I will have a copy, we can get on the phone and I  
16 will agree or disagree that it is satisfactory.

17 MR. MILLER: Thank you.

18 THE COURT: Because I'm going to ask Ms. Gerson to  
19 copy me on what she sends you, so we can work it out if it is  
20 not enough.

21 MR. MILLER: Yes, your Honor.

22 THE COURT: What about the other 35, the (a)(2)(B)  
23 people? Where are we up to? Let me hear from Mr. Miller, see  
24 what he is complaining about. So what about the (a)(2)(B)  
25 people?

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1 MR. MILLER: Your Honor, I would like to defer that as  
2 well, because I view them, especially the duplication issue, as  
3 overlapping.

4 THE COURT: Overlapping with the (a)(2)(C)?

5 MR. MILLER: Yes. Both -- several people.

6 THE COURT: Deferring is not something we really can  
7 do. The whole point is that the discovery of these experts, as  
8 I understand it, is supposed to end May 30. Is that the right  
9 date?

10 MR. MILLER: Yes.

11 THE COURT: We can't defer. Today is March 19.  
12 That's why these are being raised in the letters. You have  
13 reports, real reports from each of the 35(a)(2)(B)'s?

14 MR. MILLER: We do not have reports from the ones that  
15 are rendering site-specific reports. In most cases I think we  
16 are owed more than 20 reports at this point.

17 THE COURT: So how many (a)(2)(B) reports do you have?  
18 15?

19 MR. MILLER: They have served nine reports out of 35.  
20 That, by my math, means we are owed 26.

21 THE COURT: Of the nine you have got, are they  
22 sufficient?

23 MR. MILLER: Yes.

24 THE COURT: So you are not challenging the quality of  
25 the reports, you are challenging the duplicativeness, overlap,

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1 etc.

2 MR. MILLER: Not quality. There are some items that  
3 are the subject of item three in our agenda.

4 THE COURT: Oh, irrelevant. That's different. But  
5 the reports satisfy the rule.

6 MR. MILLER: Yes.

7 THE COURT: What you are left arguing about is whether  
8 it is duplicative and whether it is irrelevant.

9 MR. MILLER: That's correct.

10 THE COURT: I got that.

11 Where are the other 26 reports, Ms. Gerson?

12 MS. GERSON: Your Honor, based on -- they are not  
13 late. Based on the schedule, they are not due yet.

14 THE COURT: Because all 26 are site specific?

15 MS. GERSON: That's correct.

16 THE COURT: When are they due?

17 MS. GERSON: April 7.

18 THE COURT: Oh, and then we are going to be able to  
19 complete all those depositions by May 30?

20 MS. GERSON: That's the plan, your Honor.

21 THE COURT: I don't think they knew how many experts  
22 you were going to do. Why do you need nine non-site-specific  
23 and 26 site-specific? How many sites are we talking about?  
24 And why do there have to be different experts for all of these  
25 sites? Even if there are 26 sites, why do there have to be 26

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1 different people?

2 MS. GERSON: Your Honor, the retained experts, first  
3 of all, plaintiffs have not provided us with any detail about  
4 who they are complaining about. This issue was not in the  
5 letter. They have had our designations of retained experts  
6 since August for non-site specific, December for site specific,  
7 and they haven't raised this issue before today.

8 And in terms of the numbers, this is right in line  
9 with the experts in New Jersey.

10 THE COURT: Right in line with what?

11 MS. GERSON: The number of retained experts by  
12 defendants in New Jersey. So the numbers are --

13 THE COURT: I don't think activity in one case creates  
14 a waiver in another case. Either it is correct to have this  
15 many or it isn't, period.

16 MS. GERSON: And some --

17 THE COURT: Why do you need 26 different site-specific  
18 experts? How many sites are we talking about.

19 MS. GERSON: There are ten sites, and not all of these  
20 are hydrogeologists. There are site-specific issues in terms  
21 of supply, and one thing that we, like in New Jersey, are  
22 facing here are different defendants have different supply  
23 experts to explain their stories that we believe is a  
24 significant portion of the numbers.

25 As we mentioned in our letter, we do have a couple of

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1 experts that we retained for Puerto Rico that we may not have  
2 used in other cases, because they are dealing with a very  
3 different region, and we believe they have specific Puerto Rico  
4 knowledge that we can't get out of our traditional experts.

5 THE COURT: What I can say is neither the plaintiffs'  
6 attorneys nor the court can opine without seeing the reports.  
7 It may that be there is overlap and you should not be using 26  
8 different people, or it may be that because it is defendant  
9 specific, with different supplies, as you said, stories, etc.,  
10 maybe there is a need. But nobody can challenge it without  
11 seeing it.

12 So I guess until April 7, when they are due, I guess  
13 you would agree, Mr. Miller, there is nothing more I can say  
14 about the 26 who you haven't seen.

15 MR. MILLER: I agree, your Honor. That's the problem  
16 at the moment and potential duplication, which I can't really  
17 address until I see the reports.

18 THE COURT: Right, but there really isn't a lot of  
19 time between April 7 and May 30, especially if you knew these  
20 numbers back in either August or December respectively. She  
21 said you knew some in August and some in December, and here we  
22 are in March. Why didn't you say there were 70 a long time  
23 ago?

24 MR. MILLER: Because we had 35 that were not known and  
25 expected in employees. So it is the combination of the two

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1 that makes it more difficult.

2 THE COURT: So what you got notice of were the  
3 (a) (2) (B) 's.

4 MR. MILLER: We got notice of retained experts.

5 THE COURT: Was that December or August? You  
6 mentioned both dates, Ms. Gerson, I forgot which group is  
7 which.

8 MS. GERSON: The retained experts the non-site  
9 specific were disclosed last August. The retained site  
10 specific experts were disclosed in December.

11 THE COURT: By December you knew there were 35  
12 retained ones.

13 MR. MILLER: Yes.

14 THE COURT: And you didn't think that was too many.

15 MR. MILLER: No. We could get it done within the  
16 schedule. But now the number is doubled.

17 THE COURT: I realize.

18 MR. MILLER: I am hopeful we will not need to take a  
19 deposition in most of the current and former employees for  
20 various reasons; but, until I see and talk to counsel, I won't  
21 know for sure.

22 THE COURT: Right.

23 Well, I think we need to get a date on the calendar  
24 very shortly after the 7th to handle this issue of the number  
25 of experts. It really does sound very high. So I am going to

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1 stop -- it is unusual -- and look at the calendar now, for how  
2 soon after the 7th we can be ready to talk about this issue.  
3 If the issue goes away, fine, you can cancel, but at least you  
4 will be on the calendar.

5 Wednesday, April 16, at 4:30 or Thursday, April 17, at  
6 4:30. It is the earliest date I can give you, because I figure  
7 you need a week to review the reports. But early in the week  
8 is the holiday, and I don't have any idea when Good Friday is.  
9 So, anyhow, 16th or 17th at 4:30.

10 MR. MILLER: Either is acceptable to plaintiffs.

11 MR. RICCARDULLI: Same for defendants, your Honor.

12 THE COURT: Earlier the better, then.

13 (Pause)

14 THE COURT: So we will do it April 16 at 4:30. It  
15 will be a special conference just to address expert issues in  
16 the Puerto Rico case. It has to be at 4:30. I expect to be on  
17 trial. That's done.

18 So we will go on with the agenda, which is the  
19 arguments about relevant experts. The plaintiffs say there are  
20 three issues on which there is no need for experts at all.  
21 Those issues involve the question of the benefits of using MTBE  
22 versus lead. The use of lead as an octane enhancer is one of  
23 them, and the other is the benefits of using MTBE versus  
24 ethanol, and the third has to do with the overall air quality  
25 benefits of MTBE. There is one expert on each of these issues,

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1 Mr. Austin, Mr. Hoekman, and Mr. Wilson.

2 Plaintiffs, as I say, said that all of these are  
3 irrelevant. The defendants disagree as to all three  
4 categories, so we should start with the question of lead and I  
5 will go with the defendants' argument. Defendants say that the  
6 reasons for the lead phased out in the introduction of MTBE as  
7 an octane enhancer is relevant as to why MTBE was used in the  
8 first place. Defendants argue they are entitled to explain why  
9 they decided to use MTBE at all.

10 I should preface this and say also defendants say that  
11 this is a serious issue that shouldn't be raised through letter  
12 submissions, and it should be done as a full motion *in limine*  
13 on the eve of trial. I understood Mr. Riccardulli to address  
14 that point. But the reason why it is timely now and should not  
15 be done as a motion *in limine* in either trial is because of the  
16 issue of depositions. There are so many depositions to  
17 schedule, that if I were to agree with the plaintiffs' argument  
18 on any one of these three, that is one less deposition. I  
19 would rather not leave it out until later in the game because  
20 all the work has to get done now when time is precious.

21 So I actually thought we could discuss each of the  
22 three, and it is the lead one that I thought was the easiest.  
23 It is not a subject for expert testimony. If you want to  
24 explain why you decided to use MTBE, call a fact witness. Call  
25 somebody in the company. You don't hire an expert when there

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1 is no issue to be decided by the jury. You are saying  
2 essentially this is background information that you think a  
3 jury should know. You think you should have a right to explain  
4 to the jury why you decided to use MTBE, fine. But to hire an  
5 expert? One expert breeds a competing expert, as if the jury  
6 is going to be asked a question, and they are not. This is  
7 background information that you say they should know and have a  
8 right to know. So there are a lot of fact witnesses who know  
9 that answer. I don't see why this is a matter for expert  
10 testimony.

11 MR. RICCARDULLI: Yes, your Honor. Just two points,  
12 one on the timing of the -- sort of the -- that this be briefed  
13 more fully. If it is a question of timing, we are certainly  
14 happy to do that now if that's what the court would want. But  
15 we do think that if the court's considering striking one of  
16 these experts, that this should be done on a fuller record.

17 THE COURT: Nobody needs extra work. This one seemed  
18 easiest of the three. The other two may take me more time. I  
19 may allow short submissions, but I thought the first one was  
20 really obvious. You don't hire experts when it is matter of  
21 fact in the company. Anybody from the company knows the  
22 answer.

23 MR. RICCARDULLI: Yes, your Honor. The expert is  
24 going to say and explain that when lead was phased out, the  
25 industry was faced with having to replace lead and gasoline.

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1 The expert was not retained to address that one piece. They do  
2 go on to talk about the other benefits or the feasibility of  
3 MTBE versus --

4 THE COURT: That may be overlapping with somebody  
5 else. That's the problem with overlap. You may have an expert  
6 already about, whatever you call it, the feasibility.

7 MR. RICCARDULLI: We don't, your Honor. One of the  
8 experts was in -- you referenced them before, and you will  
9 remember at least Mr. Austin who testified as to the air  
10 quality benefits of MTBE in gasoline, he testified in the New  
11 York City case, and you will remember -- you may recall that he  
12 testified in the case.

13 THE COURT: The good luck for me is that I don't  
14 remember hardly anything about it.

15 MR. RICCARDULLI: Mr. Wilson also was involved in that  
16 prior case, your Honor, resumed on sort of the scope of his  
17 testimony that deals with more of the regulatory framework  
18 generally with gasoline, not as to just the phaseout of lead or  
19 the benefits of lead versus MTBE. We are not arguing that lead  
20 was a viable alternative.

21 THE COURT: That's my point. It is not an expert  
22 issue.

23 MR. RICCARDULLI: Your Honor, I can look at that. I  
24 would like to confer and go back and see if we can remove that  
25 one piece, but these experts -- we don't have one expert

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1 committed to that sole issue. If that's really what's driving  
2 it here, that the lead phaseout and how we can explain that,  
3 and if that resolves this, then I can certainly confer with my  
4 group and see if we are willing to move past that.

5 THE COURT: Mr. Miller, do you want to be heard on  
6 these three different subjects or do you think this is amenable  
7 to further meeting and conferring? Because I guess  
8 Mr. Riccardulli is arguing that some portion of these experts  
9 is background in a sense that you could see what they did at  
10 the City of New York trial, whether it was really any different  
11 here; and if it was limited to those subjects, you may not have  
12 an objection particularly, if it doesn't overlap some other  
13 expert. And that's the point to read all nine of the non-site  
14 specific expert reports that you have and be specific about  
15 overlap. There should not be two people saying the same thing.  
16 That should be obvious, Mr. Riccardulli. It's going to be a  
17 long trial as it is. You do not need two people to say the  
18 same thing. It's just confusing to the jury and annoying.

19 MR. MILLER: There is literally no dispute that the  
20 jury has to hear about with respect to lead.

21 THE COURT: I covered that. I think Mr. Riccardulli  
22 gets the idea, and he said, I will look at the report, I will  
23 talk to my team, I will try to take out any portion that does  
24 not relate to a disputed issue.

25 MR. MILLER: Frankly, your Honor, I think ethanol is

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1 the same situation. I think that the defendants can, through  
2 fact witness, give any background information they need to give  
3 about ethanol.

4 THE COURT: Let's be specific about Hoekman. What's  
5 Hoekman saying that we need an expert witness when, again, it  
6 is not a subject for decision?

7 MR. RICCARDULLI: Yes, your Honor. Maybe this helps  
8 frame it. Plaintiffs have a design defect claim in this case  
9 that the defendants should not have used MTBE. One of  
10 plaintiffs' own experts, Mr. Moreau, in his report talks about  
11 the feasibility and the benefits that ethanol has over MTBE.  
12 So --

13 THE COURT: Is Mr. Moreau going to give that testimony  
14 at this trial.

15 MR. MILLER: I will be happy to strike it, your Honor.  
16 It is not an issue unless the defendants are able to bring it  
17 up. He would have nothing to say about ethanol unless it is in  
18 response.

19 THE COURT: This is actually helpful. So if the  
20 plaintiffs' expert is not going to say why ethanol was a  
21 feasible alternative that should have been used in place of  
22 MTBE, if that issue is not coming up, then let's get it out of  
23 the case.

24 MR. RICCARDULLI: Not just Moreau. There are other  
25 experts, like Mr. Fogg, one of plaintiffs' experts, who talks

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1 about the environmental conditions versus the benefits of  
2 ethanol over MTBE.

3 THE COURT: If ethanol is coming out of the case on  
4 both sides, that's an advantage. It will make, God knows, a  
5 four-month trial three months or something, which is good for  
6 everybody. So maybe this is amenable to some talking, meeting  
7 and conferring between the sides. I didn't know that you would  
8 point out the plaintiffs are bringing up ethanol. I didn't  
9 know Mr. Miller would say, I will take it out if they will take  
10 it out. So if it is out of the case, it is out of the case.

11 MR. MILLER: If feasible alternative is an issue, our  
12 feasible alternative isn't going to be ethanol. It is gasoline  
13 without MTBE.

14 THE COURT: That's a different case.

15 MR. MILLER: I do not need to go into ethanol at all.

16 MR. RICCARDULLI: Then we do need to meet and confer,  
17 your Honor? Because I don't think the expert reports reflect  
18 that.

19 THE COURT: They don't know. That's the point.  
20 That's why you called them irrelevant. But you didn't know his  
21 position.

22 MR. RICCARDULLI: I did not.

23 THE COURT: So this one may solve itself, given the  
24 statements you have made on the record today, Mr. Miller, by  
25 talking directly with Mr. Riccardulli and/or his team.

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1 MR. MILLER: I will. Thank you.

2 THE COURT: The third one is -- well, the third one is  
3 what you just said.

4 MR. RICCARDULLI: Yes, your Honor, and the experts are  
5 sort of --

6 THE COURT: Right. You are saying they didn't need to  
7 do MTBE at all.

8 MR. MILLER: That's right.

9 THE COURT: The alternative is not to do it at all,  
10 not to have any oxygenate. So that takes care of the third  
11 topic of the relevancy, too. So you do need to talk.

12 MR. RICCARDULLI: We do need to talk.

13 THE COURT: Okay. Good. So that finished that.

14 We are up to the defendant's agenda items, of which  
15 there are a lot.

16 But the first one has to do with Mr. Brown's  
17 site-specific expert report which was served on January 24 and  
18 the defendants have several objections to Mr. Brown's report.

19 Defendants say that Mr. Brown improperly included  
20 damages for investigations at several nontrial sites in  
21 connection with his opinion about a particular site. I don't  
22 know how to say it, but Club de Leones, the defendants say that  
23 the commonwealth should not be allowed to recover the cost of  
24 investigating eight service stations that were not the subject  
25 of discovery. In fact, of the eight, one was dismissed and

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1 five were never identified as release sites and two were  
2 identified but would presumably come up in a later phase.

3 Defendants then say that Brown refers to several non-  
4 trial sites in connection with his opinion on the Manati and  
5 Maysonet trial sites. Brown notes that 15 additional sites may  
6 have had releases, and they weren't identified as trial sites.  
7 There has been no discovery.

8 And finally defendants object to Brown's inclusion of  
9 173 new wells that were not subject to discovery. Of these,  
10 132 are outside plaintiffs' delineated areas and, they point  
11 out that the court has already said that plaintiffs cannot now  
12 expand the delineations. The remaining 41 are inside the  
13 delineations, but defendants argued that they weren't  
14 identified during discovery, and that the court had said that  
15 if they weren't identified by, of all dates, July 1, 2011, only  
16 two and a half years ago, then they would be excluded. So, in  
17 sum, the defendants say all of this material should be  
18 excluded.

19 Of course, the plaintiffs have respond in some detail  
20 with respect to the Club de Leones. Well, they said they  
21 designated that as a receptor trial site, but never disclosed  
22 the sources, and that's what experts do, and Brown should be  
23 entitled to analyze the eight stations that are the source of  
24 the contamination into their receptor well, and that defendants  
25 would have a chance to depose Brown about that.

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1           With respect to the 173, the ones that were outside  
2 the delineated areas, which is the 132, they apparently are  
3 only mentioned in figures attached to the report and this  
4 was -- we did something like this in New Jersey. I ruled in  
5 New Jersey that Brown could discuss the wells, but only if a  
6 defendant opened the door to that. Otherwise the figures could  
7 not be shown to the jury unless the wells were removed. But  
8 there is still a disagreement about the 41 that are within the  
9 delineated areas.

10           So my thought on this, again, the defendants first say  
11 that this should be subject to a motion *in limine*. And I  
12 understand the point. Again, I don't know whether it is one of  
13 timing or one of full briefing as opposed to the letter  
14 briefing, but I can give you a tentative ruling and then see if  
15 you think you still need to fully brief.

16           So it seems that Brown should be allowed to talk about  
17 the eight stations that are the source of contamination into  
18 the receptor well that has been identified, and that can be  
19 explored at depositions, but I think the New Jersey procedure  
20 should apply to the wells outside the delineated areas. But  
21 with respect to the ones within the boundaries, I think those  
22 should be fair game, but I don't know what we do about the fact  
23 that they haven't been previously identified and what kind of  
24 discovery that would entail now. But presumptively that's  
25 where I would be coming out. I don't think the plaintiffs'

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1 responded with respect to the Manati and Maysonet trial sites,  
2 so I don't know whether those are still in dispute. If they  
3 are in dispute, is it the same argument as it is with Club de  
4 Leones, that they are the source of contamination into a  
5 receptor. I don't know. So I need to get a little more  
6 information with respect to Manati and Maysonet because I don't  
7 think the plaintiffs responded.

8 Who wrote the plaintiffs' response letter?

9 (Continued on next page)